NO. 76-145

In the

Supreme Court of the United States

OCTOBER TERM, 1976

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO
Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN W. McKENDREE
LAW OFFICES OF JOHN W. McKENDREE
1050 Seventeenth St., Suite 2500
Denver, Colorado 80202
Attorneys for Petitioners

INDEX

TABLE OF AUTHORITIES

NO. 76-145

In the
Supreme Court of the United States

OCTOBER TERM, 1976

CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO and its affiliated LOCAL UNION 1340 of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO
Petitioners,

vs.

REID BURTON CONSTRUCTION, INC., a Colorado corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners herein, Carpenters District Council of Southern Colorado [hereinafter, District Council] and Local Union 1340 of the United Brotherhood of Carpenters & Joiners of America [hereinafter, Local 1340], respectfully submit the following Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY ARGUMENT

BURTON'S BRIEF IN OPPOSITION TO THE PETITION MISAPPREHENDS THE FUNDAMENTAL ISSUE HEREIN.

The Respondent Reid Burton Construction, Inc. [hereinafter, Burton] apparently believes that the "evasive and dilatory pleading tactics" at issue herein is the alleged failure of the District Council and Local 1340 *to demand arbitration* of the subject matter of Burton's Complaint. [Reply Br. at 4, 5 and 9][1] However, the record is clear that, as framed by the decision of the Tenth Circuit herein, the "equitable defense in the instant case arose from the alleged 'evasive' and 'dilatory' pleading tactics by the unions in the District Court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement." [App. B at B-9] In contrast, there is no question, and Burton itself raises none,[2] that the affirmative defense of Burton's failure

[1]References to Burton's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit shall be to the page number thereof preceded by the abbreviation "Reply Br." References to the Appendices shall be to those in the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit [hereinafter, Petition] and shall be preceded by the abbreviation "App."

[2]Burton makes two references to defenses "raised at the eleventh hour." [Reply Br. at 6, 7] It is not entirely clear what such defenses are; however, it is uncontroverted that the Petitioners raised Burton's failure to exhaust contractual remedies in their Answer which was hardly filed at the "eleventh hour." Burton has not claimed that such defense was untimely or improperly raised as a procedural matter. The fact that the District Council and Local 1340 did not initially move to dismiss on such basis Burton's Complaint or Amended Complaint is irrelevant since their Motions to Dismiss pursuant to Fed.R.Civ.P. 12 were necessarily

(Continued on Page 3)

to exhaust contractual remedies was timely asserted in the District Council's and Local 1340's joint Answer. There was, of course, no affirmative obligation on the part of either the District Council or Local 1340 to "express a willingness to arbitrate" [Reply Br. at 4]; rather, it was Burton's responsibility to initiate the grievance and arbitration procedures under the relevant collective bargaining agreement and to seek redress of its claimed wrong. The District Council and Local 1340, by asserting the failure of Burton to exhaust contractual remedies as an affirmative defense, indicated their position that, as a substantive matter, the subject matter of Burton's claim in the District Court was arbitrable.

The issue herein is precisely drawn in the Petition. Under the language of the collective bargaining agreement at issue, should an arbitrator or court determine whether the allegedly dilatory "admission" by Local 1340 that it was bound to the terms of such agreement constitutes a *constructive* waiver of the right to insist that Burton exhaust contractual remedies prior to seeking damages for breach of a no-strike clause in an action under §301(a) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185(a)? Viewed properly, such issue is not susceptible of resolution through the facile analysis suggested by Burton. The failure to exhaust contractual remedies defense was not raised at the "eleventh hour," nor is there any question that the District Council or Local

limited, factually, to the well-pleaded allegations of the Complaint and Amended Complaint. Neither the Complaint nor the Amended Complaint alleged the existence of grievance and arbitration provisions. The absence of allegations in the Complaint provided the basis upon which the District Council and Local 1340 argued that injunctive relief restraining, *inter alia*, the Petitioners from encouraging their members to honor the Colorado Building and Construction Trades Council picket line was improper under *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). See, App. C at C-7-16. Burton then amended its Complaint to delete its prayer for injunctive relief. [App. C at C-20]

1340 untimely raised such affirmative defense as a procedural matter. The issue is, thus, not the undisputed power of a court to strike a defense improperly raised.

The Court of Appeals' decision creates a potentially broad exception to the mandate of the *Steelworkers Trilogy* which commits to the arbitral realm, where possible, determination of disputes arising under or in connection with the administration of a collective bargaining agreement. Whereas previously a court was merely required to determine if the subject matter of a civil action was arguably within the purview of a grievance and arbitration clause, it will now be able to punish a party for asserting several, conceivably inconsistent, defenses to such civil action. This exception is unwarranted under any decision of this Court and in derogation to the straightforward analysis of, *inter alia, Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972). When a collective bargaining agreement exists with a substantively broad arbitration clause, *Flair*, on its face, teaches that a court should defer resolution of so-called "equitable defenses" to the duty to arbitrate or, indeed, to the enforcement of any provision of the collective bargaining agreement to the skilled expertise of an arbitrator.[3] Seen as a question of arbitral competence, there is no practical distinction between *Flair* and the instant situation. Finally, a court's power to "maintain judicial control of [its] own proceedings..." [App. B at B-9] is an issue entirely unrelated to whether, under the facts of this matter, a party should be relegated to a contractually-agreed upon forum for the resolution of a particular dispute. Again, there is no dispute herein that the affirmative defense of Burton's failure to exhaust contractual remedies was timely raised in the District Council's and Local 1340's Answer and was consistently maintained and reiterated thereafter.

[3]Burton's analysis of *Flair* is pointedly strained. The laches defense in *Flair* arose from the failure of the union to enforce the terms of successive collective bargaining agreements over the course of approximately 4½ years. As such, the claim of laches was not simply a variation of a defense to the duty to arbitrate based upon procedural irregularities, which defense would obviously be doomed by, *inter alia, John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). Rather, the employer in *Flair* argued that the union's conduct barred, on an equitable basis, the enforcement of any provision of the collective bargaining agreement between the parties.

CONCLUSION

The Petitioners respectfully request the Court to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision in this matter.

Respectfully submitted,

LAW OFFICES OF JOHN W. McKENDREE

By _____
John W. McKendree
Attorneys for Petitioners
1050 Seventeenth St., Suite 2500
Denver, CO 80202
Telephone: (303) 572-8585

CERTIFICATE OF SERVICE

I hereby certify on this ____ day of _____, 1976, three copies of the within REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, were mailed, postage prepaid, to Robert G. Good, Esq., Law Offices of Robert G. Good, 733 Guaranty Bank Building, 817 Seventeenth St., Denver, Colorado 80202.